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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-418

NEWELL HAMMOND, *Petitioner,*

v.

UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO, UNITED PAPERMAKERS AND PAPERWORKERS, LOCAL NO. 985 and WATERVLIET PAPER COMPANY, DIVISION OF HAMMERMILL PAPER COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR RESPONDENT UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO, UNITED PAPERMAKERS AND PAPERWORKERS, LOCAL NO. 985 IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A., 20-22) is reported at 462 F.2d 174 (C.A. 6). The opinion and order of the District Court for the Western District of Michigan is reproduced in Appendix C, pp. 24-27 of the petition.

JURISDICTION

The judgment of the court of appeals (Pet. App. B, 23) was entered on June 14, 1972. The petition for a writ of certiorari was filed on September 12, 1972. The jurisdiction of this Court is invoked under 28 U.S. 1254 (1).

QUESTIONS PRESENTED

1. Whether the union security provisions set forth in Section 8(a)(3) of the National Labor Relations Act are unconstitutional because their dues payment requirement does not permit full sway for the exercise of plaintiff's religious principles in his role as an industrial employee, and therefore contravene the First Amendment.

2. Whether the the court below correctly affirmed the District Court order dismissing petitioner's complaint for failure to state a cause of action upon which relief could be granted when the undisputed record shows:

(a) That the collective bargaining agreement between the respondent Union and the Company incorporated a union security clause specifying a "union shop";

(b) that the petitioner, an employee and an adherent of the Seventh Day Adventist Church, refused at the expiration of thirty days from the execution of the collective bargaining contract, and at all times thereafter, to pay dues to the Union—the sole requirement imposed upon him; and

(c) that as a consequence of petitioner's refusal to pay union dues, assertedly because of religious proscriptions, he was discharged by the Company pursu-

ant to the collective bargaining contract and Section 8(a)(3) of the National Labor Relations Act.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth at pages 3-4 of the petition, and the text of the First Amendment to the Constitution appears at page 2 of the petition.

STATEMENT

A. The Undisputed Facts

At all times material herein, the respondent Union (United Papermakers and Paperworkers, AFL-CIO and its affiliated Local No. 985) represented a majority of the production and maintenance employees, who comprised an appropriate unit for collective bargaining, at the Watervliet, Michigan plant of the respondent Watervliet Paper Company (A. 3).[1] On behalf of these employees, the Union, on July 20, 1967, entered into a collective bargaining agreement with the Company, which incorporated standard union security provisions (Sections 3.2 and 3.4; Pet. App. E, 29), as sanctioned by the proviso to Section 8(a)(3) of the National Labor Relations Act (hereinafter the "Act"). The so-called "union shop" so established, required any production or maintenance employee not already a member of the Union to "become and remain" a member "in good standing", after thirty days from the effective date of the collective bargaining contract.

After the expiration of the thirty-day grace period, petitioner Hammond—a production employee of many

[1] "A." refers to the portions of the record filed as an Appendix with the court below.

years standing but not yet a member of the Union—notified the Union and the Company of "his unwillingness to profit unjustly from any improvements in working conditions that might result from the collective bargaining agreement (Pet. App. E, 30). Accordingly, Hammond "refused to become a member of the Union or pay membership fees and dues", assigning as the ground his "religious training" and "belief . . . as a member of the Seventh Day Adventist Church". While conceding that adherents of the Seventh Day Adventist Church "believe in proper wages, proper hours, and proper working conditions", Hammond nevertheless insisted, in this connection, that they "must not strive in their dealing with their fellowmen," nor be "unequally yoked with those of different beliefs, objectives, and principles", nor even "discriminate between employer and employee" (*Ibid.*).

Hammond refused payment of dues to the Union, the sole requirement made of him for union standing, in the further "belief that membership in and payment of fees and dues to a labor union violated his freedom of choice to deal justly and impartially with all men" (Pet, App. E, 30), he offered instead to make periodic contributions to the American Red Cross in equivalent amounts (A. 5). Hammond was discharged by the Company on August 28, 1967, pursuant to the union security clause of the collective bargaining contract "for the sole and stated reason that he had refused to join or pay dues to the local union as provided in Section 3.4" (Pet. App. E, 31).

B. The Proceedings and Decisions Below

On June 19, 1970, almost three years later, Hammond filed suit in the District Court, seeking money damages in the amount of $100,000, as well as in-

junctive relief, including fully equivalent reinstatement to his position with the Company (A. 6-7). Petitioner's action was brought on the theory that the collective bargaining agreement, "applied with the sanction of the National Labor Relations Act", violated his constitutional rights (A. 5-6).

Both the Union and the Company filed motions to dismiss the complaint on the ground, among others, that it failed to state a cause of action upon which relief could be granted. On June 30, 1971, the District Court Judge dismissed the action on this basis (Pet. App. C., 25) pointing out that the issues raised had been "fairly litigated" in other jurisdictions as exemplified by the principal decisions upon which he sought relief (A. 15), namely: *Linscott* v. *Millers Falls Co.*, 440 F.2d 14 (C.A. 1, March 29, 1971), *cert. den.*, October 12, 1971, 404 U.S. 872; *Gray* v. *Gulf, Mobile & Ohio R.R. Co.*, 429 F.2d 1064 (C.A. 5, 1970), *cert. den.*, 400 U.S. 1001 (1970); and *Dewey* v. *Reynolds Metal Co.*, 429 F.2d 324 (C.A. 6, June 4, 1970, rehearing August 13, 1970) as affirmed without opinion by this Court, 402 U.S. 689.[2]

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[2] The District Court Judge, while treating "all of the positions of the plaintiff factually . . . as true and proved" and recognizing Hammond's "sincere religious convictions", balanced "that interest with the Congressionally approved and new court approved provision of the Taft-Hartley Law which does not require the union shop . . . but permits it", unless the particular state has legislated against it (A.13).

He further observed that the "ultimate objective of a congressionally sanctioned union security" provision was to distribute the representation costs "among all of those who were participants in its benefits", thus furthering the interests of interstate commerce, noting in this regard: "One cannot avoid income tax, state, local or national by agreeing to pay the same to a charitable organization of either the government's choice or of its own choice. Taxes do not work that way." (Pet. App. C., 24-25).

The court of appeals, in a *per curiam* decision, affirmed the findings, conclusions, and judgment of the District Court, emphasizing that the specific issue on appeal has been decided adversely to petitioner by the United States Court of Appeals for the First Circuit in *Linscott* v. *Millers Falls Co.*, 440 F.2d 14 (1st Cir.), *cert. den.*, 404 U.S. 872 (1971), and by the United States Court of Appeals for the Fifth Circuit in *Gray* v. *Gulf, Mobile & Ohio R.R. Co.*, 429 F.2d 1064 (5th Cir., 1970), *cert. den.*, 400 U.S. 1001 (1971).

ARGUMENT

Petitioner's contention—that the decision below raises an important question of constitutional law not previously resolved by this Court—is anachronistic at this late date. No new element or argument has been urged by petitioner, either upon this Court or the courts below, that has not received thoroughgoing judicial consideration at the highest levels and been found wanting. Petitioner's plea is in the teeth of both reason and unanimous authority.

The United States circuit courts of appeals, when confronted with the issue at hand, have taken as their touchtone the maxim that "our case law has long drawn a distinction between the absolute freedom to *hold* religious beliefs and the freedom of conduct based upon religious beliefs" together with its corollary that the "latter freedom may be curtailed in some circumstances for the protection of society" *Cap Sante Vue, Inc.* v. *NLRB*, 424 F.2d 883 (C.A. D.C., 1970). The authoritative guidelines were set forth by this Court in such cases as *Cantwell* v. *Connecticut*, 310 U.S. 296, 303-304 (1940):

> "The constitutional inhibition of legislation on the subject of religion has a double effect. On the one hand, it forestalls compulsion by law of the

> acceptance of any creed or the practice of any form of worship . . . On the other hand, it safeguards the free exercise of the chosen form of religion. *Thus the* [*First*] *Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute but in the nature of things; the second cannot be. Conduct remains subject to regulation for the protection of society.*" [Italics supplied]

Under this doctrine, reiterated some twenty years later in *Braunfeld* v. *Brown*, 366 U.S. 599, 603-604 (1961), while "[t]he freedom to hold religious beliefs and opinions is absolute", nevertheless "the freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions"; hence "legislative power . . . may reach people's actions when they are found to be in violation of important social duties or subversive of good order, even when the actions are demanded by one's religion." This principle has been applied in a variety of contexts in which the courts have held that religious practices assertedly protected by the First Amendment must yield to legitimate and compelling governmental interests.[8]

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[8] The illustrative cases abound, as recently pointed out by the United States Court of Appeals for the District of Columbia Circuit (*Cap Sante Vue, Inc.* v. *NLRB*, *supra*, 424 F.2d at 886-887):

> "For example, a state's child labor law may take precedence over the right of a child to exercise his religion by selling religious literature. *Prince* v. *Massachusetts*, 321 U.S. 158 (1944). The refusal to comply with the federal minimum wage law may not be justified on religious grounds. *Mitchell* v. *Pilgrim Holiness Church Corp.*, 210 F.2d 879, 12 WH Cases 15 (7th Cir.) cert. denied, 347 U.S. 1013, 12 WH Cases 188 (1954), nor may the refusal to pay federal income taxes, *Parker* v. *Commissioner*, 365 F.2d 792 (8th Cir. 1966), cert. denied, 385 U.S. 1026 (1967). The use of marijuana and other drugs may be prohibited, even when used as part of a religious ceremony. *United States* v. *Kuch*, 288 F. Supp. 439 (D.D.C. 1968)."

Wisconsin v. *Yoder*,[4] contrary to petitioner's contention (petition, pp. 14-17), presents no hint of conflict with the decision below, and is, moreover, entirely harmonious with the doctrine of *Braunfeld* v. *Brown, supra*, which it reaffirms (32 L.Ed. at 33). The Court's decision—holding that an accommodation under the free exercise clause permitting Amish children age 14 and 15 to forego one or two additional years of compulsory education—was not "intended to undermine the State's compulsory school attendance statutes or to limit the powers of the State to promote reasonable standards" providing for continuing vocational education in this age bracket (32 L.Ed. 2d at 37). It may be seen at a glance that the rationale of *Linscott* v. *Millers Falls Company, supra*, adopted by the court below is altogether consistent with that of *Wisconsin* v. *Yoder*, which, it may be added preliminarily, is on a qualitatively different factual footing.

The Decision of the First Circuit in Linscott v. Millers Falls Company, 440 F.2d 14, cert. den. 404 U.S. 872

In *Linscott*, the leading case relied upon by the court below, the decision was handed down on March 29, 1971 and certiorari denied by this Court on October 21, 1971. The court of appeals there dealt with a plea precisely on all fours with that of petitioner here[5] and held that a

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[4] U.S. , 32 L.Ed. 2d 15, 92 S. Ct. , decided May 15, 1972.

[5] As the court stated (440 F.2d at 15):

"Admittedly, under the collective bargaining agreement, plaintiff's sole obligation to the union was the payment of dues and fees. She had offered to pay the equivalent to a non-religious charity, but the union declined the proposal. The company then discharged her. The present suit is for damages

union does not violate the constitutional rights of an employee when it negotiates a contract with an employer containing a union-shop clause, after which it requests the employer to discharge the employee for failure to pay union dues; that the purpose of the union-security clause is to supply funds to the union to compensate for the performance of its function as a federally empowered agent of the employees; that there is thus imposed, in effect, a uniform tax on all employees as a "fair sharing of the cost of collective bargaining" to pay for a service that—in the judgment of Congress—will promote the uninterrupted flow of interstate commerce; and that impingement upon First Amendment rights has been found permissible by this Court in such circumstances, where a compelling government interest is at stake.

In a carefully reasoned exposition, the court proceeded to surmount the constitutional hurdles sought to be raised by counsel in *Linscott*, as in the case at bar. In resolving the "more difficult question" posed by the First Amendment—"whether the governmental interest expressed in the labor legislation can justify . . . interference" with the employees' "competing interest in choosing the employment she wishes without cost to her religious convictions," the court first adverted to the maxim that "[f]reedom of religion is not absolute." In turning to a "balancing" of the interests to determine whether "the governmental interest may be paramount if it is 'compelling' "—the test spelled out by the Supreme Court in *Sherbert* v. *Verner*, 374

as well as injunctive and declaratory relief, based essentially upon the claim that plaintiff's discharge deprived her of the right of free exercise of religion under the First Amendment. The district court granted the defendants' motions to dismiss, 316 F.Supp. 1369 . . . and plaintiff appeals."

U.S. 398, 403—the court further recognized that the "elements of such a balancing test include, in addition to the importance of the governmental and religious interests, the degree of interference with the religious practice" (440 F.2d at 17).[6]

In this connection, the *Linscott* court relied upon the authority of *Railway Employees Dep't* v. *Hanson*, 351 U.S. 225 (1956)—in which a constitutional challenge on First and Fifth Amendment grounds was directed to the analogous union-shop provisions of the Railway Labor Act, as amended—and this Court's holding that " '[i]ndustrial peace along the arteries of commerce [as] a legitimate objective, 351 U.S. at 323' " for justifying the legislation in question and, equally significant, the recognition accorded by this Court to the "validity and importance of the congressional purpose to achieve uniform union membership, both to further peaceful labor relations and, as desirable for its own sake. to require a fair sharing of the costs of collective bargaining' " (*Id.*). Further pursuing the "balancing" doctrine as defined in *Sherbert* v. *Verner, supra,* the *Linscott* court declared that the "state interest in *Sherbert* (in compensating or not compensating single individuals" [with unemployment compensation], and thus merely furthering a routine "interest in saving money") was "less substantial than the federal interest in *Hanson* in preserving the principle and broad purposes of the union shop," and concluded that prime factors outweighing the interest of the recalcitrant employee, "are both the public and

[6] Cf., Clark, "Guidelines for the Free Exercise Clause", 83 Harv. L. Rev., 327 (1969); Giannella, "Religious Liberty, Nonestablishment, and Doctrinal Development", 80 Harv. L. Rev., 1381, 1390 (1967).

private interest in collective bargaining peace," thereby satisfying the *Sherbert* criterion of a "compelling" governmental interest (440 F.2d at 18).

Gray v. Gulf, Mobile & Ohio R.R. Co., 429 F.2d 1084 (C.A. 5, 1970), cert. den. 400 U.S. 1001 (1971).

This case, upon which the court below also placed reliance, likewise parallels the instant case, except that it involved a constitutional challenge, on religious grounds, of the union-shop as a federally authorized instrumentality for collective bargaining, this time between railway employees and management under the Railway Labor Act, as amended.

Again, the factual pattern presented was identical with that here presented. It was held that, in the light of this Court's teachings ("the First Amendment's protection of religious conscience is not absolute when a religious opinion is translated into an act or a refusal to act"), it is "simply not possible in an ordered society to allow every aspect of religious belief to stay the hand of government under the aegis of the First Amendment." (429 F.2d at 1072). Indeed, this Court's decisions in *Railway Employees Dep't* v. *Hanson, supra,* and *International Association of Machinists* v. *Street,* 367 U.S. 740 (1961), were viewed as fully "dispositive of the issue." (429 F.2d at 1068).[7]

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[7] In both *Hanson* and *Street,* this Court was confronted with attacks on the constitutionality of the provisions of the Railway Labor Act permitting union-shop agreements (Section 2, Eleventh, 45 U.S.C.A. § 152). However, in *Street,* the railroad employees challenging the statute, complained that "portions of the union dues which they paid were used for political purposes antithetical to their beliefs rather than for collective bargaining purposes". This Court interdicted only "the *expenditure* of unions funds for *non-collective bargaining purposes*" but at the same time the Court "specifically reaffirmed the constitutional validity of compulsory

Concluding Considerations

As this Court pointed out in *Street,* the argument that proved "decisive with Congress" was the key role of the unions in the regulatory framework designed to eliminate strike and disruption in the vital field of rail transportation. Since it was "the duty of the union acting as exclusive bargaining representative to represent equally . . . the entire membership of the craft or class, including non-union members, fairly, equitably and in good faith," it followed that the cost of performing the duties involved in negotiating and administering collective agreements must be spread among all the employees who benefited.[8] Identical considerations obtain for the labor-management bargaining machinery created by the Act here. Accordingly, the courts of appeals have considered and rejected, point-by-point, the main contentions petitioner again advances in this forum in seeking to challenge the decision below.[9]

With respect to the union security arrangements sanctioned by the Act, on a limited basis and under ap-

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exaction of union dues under union shop agreements" [367 U.S. at 771] and "left unimpaired the imprimature of constitutionality" which *Hanson* had placed on the statutory provisions in question. (427 F.2d at 1070, 1071). In the instant case, petitioner makes no claim "that any portion of the financial contributions demanded by the union would have been used for non-collective bargaining purposes", contending only that payment of union dues would be anathema because of his religious principles.

[8] The pertinent legislative history is traced by the Court in *Street* (367 U.S. 755, 760-761).

[9] The courts have not looked with any greater favor on a plea emanating from the employer side for special exemption from the Act, or an attack on the constitutionality of its collective bargaining imperatives, based upon the same religious convictions. *Cap Sante Vue, Inc.* v. *NLRB, supra.*

propriate safeguards, petitioner would have this Court outlaw a technique that was specifically authorized by the Congress more than a quarter of a century ago, after careful deliberation, and has become a common feature of labor-management relations in the main industrial sectors of our economy, including the railroad transportation industry.

This Court and the other appellate tribunals have studiously refrained from substituting the judgment of the judiciary for the judgment of the legislature. In the lengthy history of industrial relations in this country, no one has to date been able to devise a satisfactory substitute for the process of collective bargaining as the primary means of resolving labor disputes and averting strife in the industrial complex. Challenges, such as that interposed here, have been uniformly turned back. Nor, as was stated in the *Gray* case, *supra,* is this a "harsh or unjust result" under the circumstances there and here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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October 1972